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No. 06-1082

Supreme Court, U.S.
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In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF THE PETITIONER

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QUESTION PRESENTED

Does the Fourth Amendment require the suppression of evidence obtained incident to an arrest that is based upon probable cause, where the arrest violates a provision of state law?

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INTRODUCTION

From the ratification of our Constitution until the present time, States have borne the primary responsibility for enforcing criminal law. In so doing, the States, in an exercise of their sovereignty, have placed a wide variety of limitations on their officers' authority to arrest. However, these strictures are creatures of state law. A violation of these state laws does not transform a state law violation into a violation of the United States Constitution. The existence of probable cause to arrest has determined, and should continue to determine, the constitutional validity of an arrest. If the arrest is valid as a matter of national constitutional law, then any violation of state law is constitutionally irrelevant. The Constitution does not require suppression except where the Constitution itself is violated.

In the case at bar, it is undisputed that the arresting officers had probable cause to arrest, but that the arrest violated a state statute.[1] Because the arrest was founded on probable cause, the arrest was *constitutionally* proper. With a proper arrest from a constitutional standpoint, police could search incident to that arrest. Moore's Fourth Amendment rights were not violated, even if a state law was violated.

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[1] *Virginia Code* § 19.2-74, required the officers to issue a summons and release Moore.

OPINIONS BELOW

The decision of the Supreme Court of Virginia is published as *Moore v. Commonwealth*, 636 S.E.2d 395 (Va. 2006) and is reprinted in the Appendix to the Petition at 1. The *en banc* decision of the Court of Appeals of Virginia is published as *Moore v. Commonwealth,* 622 S.E.2d 253 (Va. Ct. App. 2006) (*en banc*) and is reprinted in the Appendix to the Petition at 12. Finally, the panel decision of the Court of Appeals of Virginia is published as *Moore v. Commonwealth*, 609 S.E.2d 74 (Va. Ct. App. 2005) and can be found in the Appendix to the Petition at 35.

JURISDICTION

The decision of the Supreme Court of Virginia was issued on November 3, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a), which allows this Court to review the federal law judgments of state courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition concerns the following constitutional and statutory provisions:

1. The Fourth Amendment of the Constitution of the United States, U.S. CONST. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. *Virginia Code* § 19.2-74 provides, in pertinent part:

> A. 1. Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence, except as otherwise provided in Title 46.2, or § 18.2-266, or an arrest on a warrant charging an offense for which a summons may be issued, and when specifically authorized by the judicial officer issuing the warrant, the arresting officer shall take the name and address of such

person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.

Anything in this section to the contrary notwithstanding, if any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection, or if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, a magistrate or other issuing authority having jurisdiction shall proceed according to the provisions of § 19.2-82.

STATEMENT OF THE CASE

1. Two police detectives stopped David Lee Moore after they observed him driving on a suspended license in Portsmouth, Virginia.[2] J.A. at 11-13,

[2] The officers were engaged in a radio discussion with other officers concerning the fact that a man with the nickname "Chub" or "Chubs" was driving around the City of Portsmouth. J.A. at 11, 16. Detective Mark Anthony knew Moore as "Chub." J.A. at 14-15. Detective B.J. Karpowski knew another man with such a nickname, Christopher Delbridge, and he also knew that

(Continued on following page)

15.[3] Under state law, driving on a suspended license is a Class 1 misdemeanor, which carries a maximum punishment of one year in jail and a $2,500 fine. *Virginia Code* §§ 18.2-11, 18.2-272. Moore was arrested and, eventually, he was searched incident to the arrest. J.A. at 24. In the pocket of Moore's jacket, the police recovered 16 grams of crack cocaine and from his pants pocket $516 in cash. J.A. at 24-26. Moore was charged with possession of cocaine with the intent to distribute. J.A. at 7. Prior to his trial, his attorney filed a motion to suppress, alleging, among other things, that the arrest violated the Fourth Amendment of the United States Constitution. J.A. at 5.

2. At the suppression hearing, Moore conceded that the stop was proper and that officers had probable cause to believe that Moore's license was suspended. J.A. at 19. However, he contended that he should have been released with a summons rather than arrested, as provided by Virginia law. Since he was not released on a summons, Moore argued that the

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the driver's license for Mr. Delbridge, a/k/a "Chub" was suspended. J.A. at 11. Detective Karpowski radioed to the other officers that they should stop Chub's vehicle for driving on a suspended license and they did so. J.A. at 13-15. Moore conceded at trial that the stop was proper based on the information available to the officers at the time of the stop, and he never raised any issue in connection with the stop in his appeal. J.A. at 19.

[3] J.A. refers to the joint appendix. Pet. App. refers to the documents attached to the petition for a writ of certiorari.

Constitution required that any evidence derived from the search incident to arrest should have been suppressed. J.A. at 19. The trial court, specifically relying on *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), concluded that because the officer had probable cause to arrest, the arrest was constitutionally proper. J.A. at 21. Therefore, the trial court denied the motion to suppress. J.A. at 21. Moore was convicted and sentenced to serve five years in prison, with one year and six months of that sentence suspended. Pet. App. at 2.

3. Moore appealed to Virginia's intermediate appellate court. A divided three-judge panel reversed. The panel majority observed that under *Virginia Code* § 19.2-74, the officers should have issued a summons for the misdemeanor offense instead of effecting a full custodial arrest. Since state law precluded a custodial arrest and required the issuance of a summons, the search incident to the arrest was unconstitutional. Pet. App. at 38-39. Although the panel majority acknowledged that *Atwater*, 532 U.S. at 354 and *Knowles v. Iowa*, 525 U.S. 113 (1998) did not compel this outcome, it nevertheless reasoned that suppression was "a logical and necessary extension of the decision in *Knowles*." Pet. App. at 44. A dissenting judge, however, reasoned that "[b]ecause Moore's arrest was based on probable cause that he committed the offense of driving on a suspended license, the arrest did not violate the Fourth Amendment to the United States Constitution." Pet. App. at 49. The dissent further concluded that "it is clear that the Fourth

Amendment to the United States Constitution is not violated as a result of a state law violation." Pet. App. at 49.

Virginia obtained a rehearing *en banc* by the intermediate appellate court. By a vote of 7-4, the *en banc* court affirmed the conviction. It concluded that the constitutional legitimacy of an arrest under the National Constitution hinged on whether the officers had probable cause. Pet. App. at 20. Moore's arrest was unquestionably based on probable cause. Pet. App. at 20-21. The court reasoned that the presence of probable cause is an issue that must be "determined separate and apart from whether an arrest violates a state statute." Pet. App. at 22. Finally, since the Fourth Amendment did not compel suppression for the mere violation of a state statute, the *en banc* court held that the suppression of the evidence was unwarranted. Pet. App. at 25-26. The four dissenting judges reiterated the reasoning set forth in the panel decision. Pet. App. at 27-34.

4. Moore appealed to the Supreme Court of Virginia, arguing that "the Court of Appeals [of Virginia] *en banc* erred in holding that his 'arrest and search did not violate the Fourth Amendment.'" Pet. App. at 3. That tribunal, by unanimous opinion, held that the search of the defendant, based upon a constitutionally proper arrest, nevertheless "was not consistent with the Fourth Amendment." Pet. App. at 11. The court began by examining this Court's decisions in *Knowles* and *Atwater* as well as its own decision in

Lovelace v. Virginia, 522 S.E.2d 856 (Va. 1999), a decision interpreting the United States Constitution. The Virginia Supreme Court observed that *Virginia Code* § 19.2-74, unlike the statutory provision at issue in *Atwater*, did not authorize the officers to make a custodial arrest of Moore. Pet. App. at 7. After analyzing the cases, the lower court concluded that

> the officers were authorized to issue only a summons to Moore for the offense of operating a vehicle on a suspended license since none of the exceptions in Code § 19.2-74 were present. Thus, under the holding in *Knowles*, the officers could not lawfully conduct a full field type search. We find *Knowles* and *Lovelace* controlling and hold that the search of Moore was not consistent with the Fourth Amendment.

Pet. App. at 11. In other words, the court below held that the Fourth Amendment compelled suppression of the evidence because of the violation of a state statute.

SUMMARY OF ARGUMENT

In ratifying the Fourth Amendment, the Framers of our Constitution did not purport to constitutionalize the many state rules that governed the arrest authority of state officers. Instead, they were concerned with curbing arbitrary action by agents of the newly created United States, and in particular to prevent the exactions common under the writs of assistance.

While standards for Fourth Amendment reasonableness may vary depending on the particular governmental action, over the past two centuries a standard has emerged with respect to the constitutional propriety of an arrest: an arrest is reasonable under the constitution if it is made with probable cause. This standard protects the people from arbitrary exactions while affording clarity and uniformity to law enforcement. Just as the Court has declined to incorporate strictures based upon state law in assessing the constitutionality of searches, it should do the same with respect to arrests. Virginia thus simply asks this Court to adhere to the time-tested standard of probable cause, a standard that will maintain logic and consistency in the Court's jurisprudence.

As sovereign entities under our Constitution, the States are free to craft additional protections for suspects in criminal cases, so long as they do not violate constitutional limitations. Constitutionalizing these state laws will put federal courts in the undesirable position of instructing state officers on questions of state law and would make the federal judiciary the enforcer of state law. The constitutional standard governing the law of arrests would vary with each state, and thus lose the virtue of uniformity. Furthermore, a necessary adjunct of the state power to craft criminal procedure statutes is that States should be free to determine how to remedy violations of these state statutes, including state statutes that govern the law of arrests. Some States will impose suppression as a remedy for

violations of their laws, whereas other States will turn to different remedies. The remedy of exclusion of evidence, designed to vindicate violations of the United States Constitution, should not be applied to enforce state statutes, particularly when the States have not deemed this remedy appropriate. It also would be incongruous to impose the remedy of suppression of evidence based upon the violations of a state statute, when the exclusionary remedy is not compelled for violations of many federal laws.

Moore's arrest was constitutionally proper because the officers made the arrest based on probable cause. Therefore, the officers could search incident to that arrest. Once a suspect is arrested, the twin rationales of officer safety and preservation of the evidence apply. These justifications operate independently of state laws. A review of the decisions of this Court confirms the constitutional propriety of the arrest in the case at bar and of the search incident to that arrest.

Grafting the many state laws, regulations and procedures onto the probable cause standard would have undesirable consequences. First, it would inject great complexity and confusion into an area of the law that has long been settled. This Court has recognized that officers in the field benefit from straightforward, bright-line rules. A "probable cause plus" standard, requiring courts to examine state statutes in addition to probable cause, would be the antithesis of the current standard. Moreover, requiring every arrest to turn on probable cause and

any state law requirements is not necessary to protect the citizens from law enforcement. The probable cause standard protects the citizenry from arbitrary police action. Nor is there an epidemic of misdemeanor arrests that must be cured by departing from settled constitutional analysis. Indeed, constitutionalizing state statutes in this area would trigger the application of the exclusionary rule. This, in turn, would create a disincentive for States to enact such laws. As a consequence, the public could well lose the benefit of these supplemental protections currently afforded to them under state law.

ARGUMENT

I. THE CONSTITUTIONAL STANDARD OF PROBABLE CAUSE, NOT THE VAGARIES OF STATE LAW, SHOULD CONTINUE TO DETERMINE THE CONSTITUTIONALITY OF AN ARREST.

The rule Virginia urges this Court to adopt is a modest one, which would require this Court to do nothing more than reaffirm longstanding precedent: an arrest is *constitutionally* valid if it is based on probable cause. If the arrest is constitutionally valid, the Constitution does not require suppression simply because the arrest violates a provision of state law. The Court should decline to graft the myriad strictures of state law onto the historically validated probable cause standard.

A. Neither the History Behind the Adoption of the Fourth Amendment Nor Its Application in Modern Times Warrant the Incorporation of the State Law of Arrests Into the Probable Cause Standard.

1. The Fourth Amendment Was Adopted to Protect Citizens From Arbitrary Police Action, Not to Govern the Minutia of an Officer's Arrest Authority Under State Law.

The debate surrounding the adoption of the Bill of Rights does not evince any concern that officers might conduct arrests in violation of particular state laws governing arrests – which is unsurprising, since the Bill of Rights did not apply to the States. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833). Rather, the "indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 583 (1980). "Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws." *Stanford v. Texas*, 379 U.S. 476, 481 (1965). "There is no historical evidence that the Framers or proponents of

the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables and other peace officers.'" *Atwater*, 532 U.S. at 339-40.[4] Instead, "the purpose of the Fourth Amendment was to protect the people of the United States against *arbitrary action* by their own Government." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) (emphasis added).[5]

Moore's arrest, although problematic as a matter of state statutory law, bears no resemblance to the evils that prompted the ratification of the Fourth Amendment. The requirement of probable cause as a precondition for an arrest protects the citizenry from the type of arbitrary exactions visited upon the colonists. The existing standard satisfies the purpose that motivated the ratification of the Fourth Amendment.

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[4] *See also United States v. Watson*, 423 U.S. 411, 429 (1976) (Powell, J., concurring).

[5] *See also United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) (noting that the purpose of the Fourth Amendment is "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals").

2. The Modern Jurisprudence of this Court Has Upheld as Reasonable Arrests That Are Based on Probable Cause.

Although "[t]he touchstone of the Fourth Amendment is reasonableness," *United States v. Knights*, 534 U.S. 112, 118 (2001), the constitutionality of an arrest does not turn on amorphous considerations of reasonableness. "It is of course true that in principle every Fourth Amendment case, since it turns upon a 'reasonableness' determination, involves a balancing of all relevant factors. With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause." *Whren v. United States*, 517 U.S. 806, 817 (1996) (holding that a traffic stop was proper when based on probable cause and that a further assessment of reasonableness was unnecessary).[6] The Court has consistently refused to

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[6] *See also Maryland v. Pringle*, 540 U.S. 366, 370 (2003) ("A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause."); *Atwater*, 532 U.S. at 354 ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."); *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979) (describing probable cause as "the constitutional prerequisite for an arrest."); *Watson*, 423 U.S. at 417-24 (upholding as constitutional warrantless arrests based on probable cause); *United States v. Robinson*, 414 U.S. 218, 235 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment[.]");

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dilute or expand the standard of probable cause in favor of a broader "reasonableness" inquiry.[7]

"The requirement of probable cause has roots that are deep in our history." *Henry v. United States*, 361 U.S. 98, 100 (1959). The "long-prevailing standards" of probable cause have embodied "the best compromise that has been found for accommodating [the] often opposing interests" in "safeguard[ing] citizens from rash and unreasonable interferences with privacy" and in "seek[ing] to give fair leeway for enforcing the law in the community's protection." *Brinegar*, 338 U.S. at 176. The probable cause standard "reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment. . . ." *Dunaway*, 442 U.S. at 213. The Court should hold fast to this wisdom.

To be sure, in other contexts, Fourth Amendment reasonableness has imposed different requirements. For instance, in the context of inventory searches or traffic checkpoints, courts assessing the

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Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (upholding arrests based on the "long-prevailing" standard of probable cause).

[7] *See Whren*, 517 U.S. at 817 (holding that traffic stop was proper when based on probable cause and that a further assessment of reasonableness was unnecessary); *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (declining to abolish probable cause in favor of a multi-factor balancing test to determine the constitutionality of an arrest).

reasonableness of a search under the Fourth Amendment will examine state law, policies, regulations and procedures. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding drunk driving checkpoints). *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976) (upholding inventory searches). Tethering such suspicionless searches to state policies, procedures, regulations or statutes ensures that police are engaged in the legitimate function of carrying out an inventory or a checkpoint rather than as "a ruse for general rummaging in order to discover incriminating evidence." *Florida v. Wells*, 495 U.S. 1, 4 (1990). Unlike inventory or traffic checkpoint searches, the requirement of probable cause precludes the government from engaging in suspicionless rummaging. In the context of inventory searches or traffic checkpoints, the statute, policy or regulation ensures that the inventory search or the traffic checkpoint is reasonable for Fourth Amendment purposes, just as the probable cause requirement ensures that an arrest is reasonable under the Fourth Amendment. *See Opperman*, 428 U.S. at 376 (noting that inventory searches conducted pursuant to standard police procedures are reasonable); *Sitz*, 496 U.S. at 455 (drunk driving checkpoint based on specific guidelines was reasonable under the Fourth Amendment).

With respect to arrests, state law is relevant to the *application* of the probable cause standard, but it does not supply the standard itself. For example, a

particular act may constitute a crime in one State but not in another. Therefore, an officer who has probable cause to believe that a suspect has violated a particular statute may properly arrest in the State that has enacted such a statute, but may not arrest in a
State where that statute does not exist. State law operates as a factual backdrop to the application of the standard mandated by the United States Constitution. However, the probable cause standard itself is a creature of the United States Constitution rather than of state law. Another illustration of this phenomenon outside of the Fourth Amendment context are the cases under *Jackson v. Virginia*, 443 U.S. 307 (1979). Under *Jackson*, state law defines the crime, but the Due Process standard flows from the Constitution itself. That standard, derived independently of the underlying law, is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

In sum, while the Fourth Amendment standards may differ depending on the particular government action, in assessing the constitutionality of an arrest, this Court has unswervingly concluded that "a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford,* 543 U.S. 146, 152 (2004).

B. This Court Has Previously Declined to Incorporate State Law in Assessing the Constitutionality of *Searches* and It Should Do So Again With Respect to the Constitutional Law of *Arrests*.

The judgment below requires courts to examine, in addition to probable cause, whether the arrest occurred in conformity with state laws governing arrests. With respect to searches, this Court has held that the constitutional standard must operate independently of state law. In evaluating the admissibility of wiretap evidence obtained by state officers, this Court concluded that if a Fourth Amendment violation has occurred, it does not matter that the officers were state officers rather than federal officers. *Elkins v. United States*, 364 U.S. 206, 223 (1960). "[T]he test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." *Id.* at 223-24.

More recently, the Court rejected the argument "that [a defendant's] expectation of privacy in his garbage should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure of his garbage was impermissible as a matter of [State] law." *California v. Greenwood*, 486 U.S. 35, 43 (1988). This Court acknowledged that States could impose more stringent constraints on the police than those imposed by the United States Constitution, but noted that it "had never intimated, however, that whether or not a search is reasonable

within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs." *Id.*

Given the holdings in *Greenwood* and *Elkins*, "it would be incongruous to use state law to determine whether the exclusionary rule should apply to a search incident to arrest, but to use federal law to determine whether the exclusionary rule should apply to all other searches." *United States v. Wright*, 16 F.3d 1429, 1436 (6th Cir. 1994). Adhering to the probable cause standard would thus preserve the consistency of this Court's Fourth Amendment jurisprudence.

II. THE HOLDING BELOW IS INCOMPATIBLE WITH OUR CONSTITUTIONAL SYSTEM OF DUAL SOVEREIGNTY.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "The States thus retain substantial sovereign authority under our constitutional system." *Id.* This residuum of sovereignty means that States remain free to enact certain policy choices into law – and to decide how to remedy violations of these laws – so long as they do not infringe on the protections afforded by the National Constitution.

A. Incorporating State Law Into the Constitutional Standard for Arrests Will Place Federal Courts in an Improper Supervisory Role Over Questions of State Law.

Under the decision below, the constitutionality of an arrest often will turn on a question of state law. If this standard were adopted, federal courts adjudicating habeas cases filed under 28 U.S.C. § 2254 and in civil rights cases under 42 U.S.C. § 1983, inevitably would have to "instruct[] state officials on how to conform their conduct to state law." *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). "[S]uch a result conflicts directly with the principles of federalism." *Id.* "[I]t is difficult to think of a greater intrusion on state sovereignty." *Id.* The decision below also turns dual sovereignty on its head by pressing the United States Constitution into the service of a state statute. If "state law can transform constitutional police conduct into its opposite," it would "unravel our federal system, since treating a state law as a violation of the Constitution 'is to make the federal government the enforcer of state law.'" *California v. McKay*, 41 P.3d 59, 65 (Cal. 2002).[8]

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[8] *See also Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988).

B. The Judgment Below is Irreconcilable With a Uniform Constitutional Standard That Applies to all States.

There is an "important need for uniformity in federal law," *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). The lower court's rationale would inject widespread and anomalous variations in the law because the scope of constitutional protection from arrest would advance or recede based on a State's boundaries. Persons in Virginia would benefit from greater national *constitutional* protections, by virtue of the existence of *Virginia Code* § 19.2-74, than would residents of States that do not have a misdemeanor summons statute. Indeed, there likely would be two constitutional standards within a single State: the same arrest may be unconstitutional if made by a Virginia officer, but ruled constitutional if made by a federal officer, who is not subject to *Virginia Code* § 19.2-74.[9] Furthermore, if adopted, the standard below would signify that each time a state legislature convened, it could modify the *constitutional* standard by enacting state legislation governing the conduct of the officers of that State.

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[9] Under the Supremacy Clause, any contrary federal law would clearly override state law governing the conduct of its officers. U.S. CONST. art. VI, cl. 2. *Cf. Printz v. United States*, 521 U.S. 898, 933 (1997) (State law enforcement cannot be commandeered to enforce federal law).

C. If States Afford Criminal Defendants Safeguards Beyond the National Constitutional Minimum, Those Safeguards Operate Separately From the National Constitution Itself.

Although "a State is free *as matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards," a State "may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Oregon v. Hass*, 420 U.S. 714, 719 (1975). In a host of areas, the States, including Virginia, have imposed additional safeguards for criminal defendants. *See* James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALBANY L. REV. 1183 (2000).[10] For example, Virginia has enacted a strict speedy trial statute,[11] has provided for discovery by defendants in criminal cases,[12] and has

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[10] *See also* Susan King, *State Constitutional Bibliography: 1989-1999*, 31 RUTGERS L.J. 1623 (2000) (summarizing research on State Constitutional Law by State and topic).

[11] *Virginia Code* § 19.2-243 (requiring dismissal with prejudice if an incarcerated defendant is not brought to trial within five months of a preliminary hearing or within nine months of the preliminary hearing if the defendant is not incarcerated pre-trial). *Cf. Barker v. Wingo*, 407 U.S. 514, 530 (1972) (setting fourth a multi-factor test for assessing speedy trial violations under the United States Constitution).

[12] *See* VA. S. CT. RULES 3A:11, 7C:5 and 8:15 (allowing limited discovery in criminal cases). In contrast, "[t]here is no

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established multiple layers of appellate review in criminal cases.[13] These provisions are not mandated by the National Constitution, but simply represent a policy choice on the part of the Virginia General Assembly.

Similarly, the remedies for violating these provisions should be the resort of state law rather than matters of Constitutional magnitude. The States, who draft these criminal procedure statutes, should have the prerogative of determining how violations of these statutes will be punished. *See Greenwood*, 486 U.S. at 44 (noting that a State could eliminate the exclusionary rule as a remedy for violations of state law). To one State, the violation of a particular procedure may seem especially egregious, and that state can provide a stringent remedy, such as the exclusionary rule. For example, if a State wishes to require the suppression of evidence seized outside of an officer's jurisdictional boundary, or because the officer should have issued a summons instead of making an arrest, a State can so provide.[14]

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general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

[13] *See, e.g.*, VA. S. CT. RULES Part 5 and 5A. Of course, the United States Constitution does not provide a right to an appeal in a criminal case. Rather, "[t]he right of appeal, as we presently know it in criminal cases, is purely a creature of statute." *Abney v. United States*, 431 U.S. 651, 656 (1977). *See also McKane v. Durston*, 153 U.S. 684, 687 (1894).

[14] *New Mexico v. Bricker*, 134 P.3d 800, 805-08 (N.M. Ct. App. 2006) (New Mexico Constitution required suppression even

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Another State may conclude that the violation of a particular state statute should be remedied through administrative hearings or through the tort system – or that a particular statute or regulation supplies a guideline only, for which there is no remedy.

The decision concerning when the suppression remedy is appropriate for violations of state law should remain with the states. Subject to the limitations of the United States Constitution, the States may experiment with their laws. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). While the Constitution allows the States to experiment, it does not penalize the States if they fail to follow their own self-imposed rules. The Constitution's exclusionary rule penalizes federal constitutional violations, *see Elkins*, 364 U.S. at 217,[15] not violations of state law. Although a State

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if United States Constitution did not); *Nevada v. Bayard*, 71 P.3d 498, 503 (Nev. 2003) (evidence seized following arrest that contravened misdemeanor arrest statute must be suppressed under the Nevada constitution); *Ohio v. Brown*, 792 N.E.2d 175, 177 (Ohio 2003) (Ohio Constitution provided greater protection than United States Constitution and, therefore, evidence seized after wrongful arrest for minor misdemeanor must be suppressed); *Montana v. Bauer*, 36 P.3d 892, 897 (Mont. 2001) (arrest improper under Montana law when offense carries no jail time and evidence seized incident to the arrest must be suppressed).

[15] *See generally Mapp v. Ohio*, 367 U.S. 643 (1961). *See also United States v. Walker*, 960 F.2d 409, 415 (5th Cir. 1992) ("[T]he exclusionary rule was created to discourage violations of the Fourth Amendment, not violations of state law.").

may provide a suppression remedy for violations of state law, the Constitution does not. To say otherwise is to ignore the division of sovereignty between the States and the National Government that is "a defining feature of our Nation's constitutional blueprint." *Federal Mar. Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 751 (2002).

To illustrate, the current remedy for violations of Virginia's speedy trial statute is dismissal with prejudice of the charges. *Virginia Code* § 19.2-243. However, Virginia could employ a different remedy if it so chose or even repeal the statute altogether. Virginia could allow compensatory damages, sanctions against the prosecutor, or some other mechanism to remedy violations of its statute. So long as Virginia did not infringe on the defendant's constitutionally protected rights, it could implement whatever remedy the legislature deemed appropriate. The same principle should apply regarding the law of arrests.

With respect to the misdemeanor-summons statute, the remedy available to a wrongfully arrested suspect under Virginia law is a civil action in tort for false arrest, rather than application of an exclusionary rule. *See Jordan v. Shands*, 500 S.E.2d 215, 218 (Va. 1988) (discussing false arrest tort).[16] Furthermore, under longstanding Virginia law, citizens have the right to resist an illegal arrest.

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[16] *See also DeChene v. Smallwood*, 311 S.E.2d 749, 751 (Va. 1984) (same).

Virginia v. Hill, 570 S.E.2d 805, 808 (Va. 2002) (noting right under Virginia law, rooted in the common law, to resist an illegal arrest).[17] A Virginia officer who chooses to flout *Virginia Code* § 19.2-74, therefore, acts at his own peril.[18] Thus, Virginia law provides time-honored remedies for arrests made in violation of its laws, even though the remedies do not include suppression.[19]

D. The Constitution's Exclusionary Rule Should not be Extended to Vindicate State Statutes.

The purpose of the exclusionary rule is to deter violations of *constitutional* rights. *See Elkins*, 364 U.S. at 217. Absent the state statute at issue, there would be no question that Moore's arrest was proper. *Atwater*, 532 U.S. at 354-55. Moore conceded at trial that he had a suspended license and, thus, the

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[17] *See also McCracken v. Virginia*, 572 S.E.2d 493, 497 (Va. Ct. App. 2002) (same).

[18] Although not addressed in the opinion below, Virginia law provides a parallel misdemeanor-summons statute for traffic offenses, *Virginia Code* § 46.2-936. This statute specifies an even more draconian remedy. Any officer who violates *Virginia Code* § 46.2-936 is "guilty of malfeasance in office" and can be removed "upon complaint filed by any person in a court of competent jurisdiction."

[19] In Virginia, "absent an express statutory provision for suppression," *Troncoso v. Commonwealth*, 407 S.E.2d 349, 350 (Va. Ct. App. 1991), "searches or seizures made contrary to provisions contained in Virginia statutes provide no right of suppression." *Id.*

officers had probable cause to arrest. J.A. at 19. Holding that the Constitution requires suppression under such circumstances would inappropriately expand the scope of the exclusionary rule beyond its doctrinal foundation of vindicating constitutional interests. Furthermore, there is no justification for automatic suppression following violation of a state statute when suppression is not automatically required for violations of federal treaties, statutes, or regulations.[20]

The fact that an arrest is authorized by statute will not prevent suppression if the arrest violates the Constitution. *Elkins*, 364 U.S. at 217. Conversely, as long as the arrest conforms to the Constitution, because the arrest is based on probable cause, the absence of statutory authority under state law to make an arrest should not trigger suppression under the Constitution. For example, there is no statutory authority for private persons to trespass onto private property, remove evidence and take it to the police. Yet, the actions by such third parties would not trigger the suppression of this evidence. *Bourdeau v. McDowell*, 256 U.S. 465, 476 (1921). Just as the presence of authority will not salvage an

[20] *See Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2680-82 (2006) (suppression not an appropriate remedy for a violation of the Vienna Convention on Consular Relations); *United States v. Donovan*, 429 U.S. 413, 432-32 n.22 (1977) (denying exclusion for violation of wiretapping statute); *United States v. Caceres*, 440 U.S. 741, 755 (1979) (violation of IRS eavesdropping regulation did not require suppression).

unconstitutional arrest, the absence of authority under state law should not require the suppression of evidence obtained following an arrest that is constitutional because it is founded on probable cause.

The suppression of evidence should be a last resort, not a first impulse. *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006). Among other things, the Constitution's exclusionary rule exacts "substantial social costs," including the release of dangerous criminals. *Id.* at 2163. Instead of promoting respect for the law, if the exclusionary rule is "applied indiscriminately[,] it may well have the opposite effect of generating disrespect for the law and administration of justice." *Stone v. Powell*, 428 U.S. 465, 491 (1976). Where a State has not deemed it appropriate to implement a state law exclusionary rule as a deterrent for a violation of its own law, the constitutional remedy of exclusion of evidence should not be forced upon the States.

III. UNDER THIS COURT'S JURISPRUDENCE, THE OFFICER'S SEARCH OF MOORE INCIDENT TO HIS ARREST WAS CONSISTENT WITH THE FOURTH AMENDMENT.

A. An Officer Can Search Incident to an Arrest That Is Lawful Under the Constitution.

A search incident to arrest is permissible if based on a "lawful" arrest. *Robinson*, 414 U.S. at 224.[21] In *Robinson*, the Court specified what it meant by a "lawful" arrest: "[A] custodial arrest of a suspect based upon probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *Id.* at 235. As Professor LaFave notes, the phrase "lawful custodial arrest" in these cases "refers not to the limitations of state law but rather to an overarching principle that all it takes to make a custodial arrest reasonable in a Fourth Amendment sense is that it be based on probable cause." 1 Wayne R. LaFave, *Search and Seizure*, § 1.5B (4th ed. 2004).

Furthermore, once an officer has made a constitutionally valid arrest, the officer can search incident to that arrest. "Conditioning a search incident to arrest on the degree to which an otherwise

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[21] *See also Preston v. United States*, 376 U.S. 364, 367 (1964); *Harris v. United States*, 331 U.S. 145, 151 (1947).

constitutional arrest complies with state procedure . . . makes no sense." *McKay*, 41 P.3d at 70. The justifications for searches incident to arrest are the need to protect the safety of the officer – and other suspects – and preserving evidence justify a search incident to a constitutionally permissible arrest. *Knowles*, 525 U.S. at 116. Neither of these rationales depends upon the arrest's compliance with state law. Finally, if the arrest is constitutional, because it is based on probable cause, there is no "poisonous tree" from which the fruit must be suppressed.

B. This Court Has Never Held That a Violation of State Law Renders an Arrest *Constitutionally* Unlawful.

1. *Atwater* and *Knowles* Are Inapplicable to the Issue of Whether the Constitution Requires Suppression Because the Arrest Violates State Law.

The lower court, relying on this Court's decisions in *Atwater* and *Knowles,* concluded that the search incident to arrest violated Moore's rights under the United States Constitution. Pet. App. at 11. Those cases are inapplicable to the issue presented in the case at bar. In *Knowles*, this Court held that the Constitution could not support a search incident to the issuance of a citation, because the concerns underlying the search incident to arrest – officer safety and the need to preserve evidence for trial – do not apply to a situation where the officer issued a

citation. 525 U.S. at 118-19. Here, however, the officers were not issuing a citation; they made a full custodial arrest. Therefore, *Knowles* sheds no light on the present case.

In *Atwater*, this Court held that a full custodial arrest for a seatbelt violation did not violate the United States Constitution. *Atwater*, 532 U.S. at 354-55. While the Texas statute at issue authorized the officer to make a full custodial arrest, the decision did not turn on that fact. *Id.* at 323, 354. Given the background of state law in *Atwater*, the issue presented by *Moore* was not present.

Atwater does, however, support the position of Virginia in several important respects. After an in-depth examination of the historical evidence, the Court concluded that "[n]either the history of the framing era nor subsequent legal development indicates that the Fourth Amendment was originally understood, or traditionally has been read" to preclude an arrest for a minor offense. *Id.* at 336. The offense at issue in *Atwater* was a non-jailable seatbelt violation. *Id.* at 323. In contrast, in the case at bar, the officers had probable cause to believe Moore had committed a crime punishable by a maximum sentence of 12 months in jail.[22] The Court further concluded that the balancing tests urged by the defendant were

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[22] *Virginia Code* § 46.2-301 (driving on a suspended license a Class 1 misdemeanor); *Virginia Code* § 18.2-10 (Class 1 misdemeanors punishable by up to 12 months in jail).

impracticable, particularly when compared with the simplicity of the longstanding probable cause test. *Id.* at 346-54. *Atwater* thus provides strong support for the standard Virginia urges this Court to re-affirm.

2. Neither *Di Re* nor *DeFillippo* Command the Constitutional Remedy of Suppression for a Mere Violation of State Law.

Neither *United States v. Di Re*, 332 U.S. 581 (1948), nor *DeFillippo*, 443 U.S. 36, lend support to the view that the constitution requires suppression of the fruits of a search for an arrest that is based upon probable cause, but the arrest violates a state statute. In *Di Re*, this Court reversed a federal conviction for possession of counterfeit gasoline coupons. *Di Re*, 332 U.S. at 582. The United States argued that the search could be justified as a search incident to the arrest. *Id.* at 587. The Court held that "in the absence of an applicable federal statute, the law of the state where an arrest without warrant takes place determines it." *Id.* at 589. In so holding, the Court drew from a federal statute, since amended, which provided that an arrest *by judicial process* for a federal offense must be made "agreeably to the usual mode of process against offenders in such State." *Id.* at 589.[23] The Court reasoned that if federal statutory law required

[23] The successor statute does not require that an arrest be agreeable to the usual state process. 18 U.S.C. § 3041.

compliance with state law for arrests *with a warrant*, federal courts should logically turn to state law to determine the validity of arrests *without a warrant*. *Id.* at 589-90. Since the arrest in *Di Re* was invalid under New York law, the Court held that the fruits of the search incident to arrest should be suppressed. *Id.* at 595.

First, as the text of *Di Re* shows, and as a number of courts have concluded, the decision was grounded not in the United States Constitution but on the supervisory power of this Court to exclude evidence under circumstances deemed improper but not unconstitutional.[24] Second, as several appellate courts have recognized, the holding in *Di Re* is no longer valid in light of the Court's subsequent holdings in *Elkins*, 364 U.S. at 224, and *Greenwood*, 486 U.S. at 43-44.[25]

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[24] *See Wright*, 16 F.3d at 1435; *Walker*, 960 F.2d at 416; *McKay*, 41 P.3d at 66-67; *Street v. Surdyka*, 492 F.2d 368, 373 n.7 (4th Cir. 1974). *See also* LaFave, *Search and Seizure* at § 1.5 ("a close inspection of the *Di Re* decision indicates that the use of state law there was 'based on non-constitutional considerations' ").

[25] *See Wright*, 16 F.3d at 1434-36; *Walker*, 960 F.2d at 416; *McKay*, 41 P.3d at 66-67. In this connection, *United States v. Garcia*, 462 U.S. 1127 (1983), is worth noting. The Fifth Circuit had ordered evidence suppressed because the seizure of marijuana from the defendants' truck contravened the officers' arrest authority under Texas law. *United States v. Garcia*, 676 F.2d 1086, 1093-94 (5th Cir. 1982). Under Texas law, the game warden's authority was limited to state parks and to violations of hunting laws, but the officer made the arrest outside of the state park, for an offense not connected to hunting laws. *Id.* This

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In *Johnson v. United States*, 333 U.S. 10 (1948), this Court concluded that the evidence must be suppressed because the officers made a warrantless entry of a hotel room when no exigent circumstances were present. *Id.* at 12-15. The United States asked the Court to uphold the search on the basis of a search incident to arrest. *Id.* at 15. In a footnote, the Court cited *Di Re* for the proposition that "[s]tate law determines the validity of searches without warrant." *Id.* at 15 n.5. *Johnson* thus mentions, in passing, the prudential rule announced in *Di Re* to govern the conduct of federal law enforcement. It does not purport to transform *Di Re*'s non-constitutional holding into a constitutional rule.

Furthermore, the Court held that the officers lacked probable cause to make the arrest until they gained entry into the defendant's hotel room and, therefore, the officers could not rely on the facts gleaned from the illegal entry to justify the arrest or the search incident to arrest. *Johnson*, 333 U.S. at 16-17. Thus, the admissibility of the incriminating evidence did not turn on state law, but rather on the fact that the officers lacked probable cause. This footnote in *Johnson*, in addition to reiterating the prudential doctrine announced in *Di Re*, is

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Court reversed and remanded in light of *United States v. Ross*, 456 U.S. 798 (1982) (holding that an officer who has probable cause to search an automobile may search compartments in the automobile). *Garcia*, 462 U.S. at 1127. This result cannot be reconciled with *Di Re* if *Di Re* announced a constitutional rule.

also dicta. The Court is not bound by such dicta. *Central Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006).

DeFillippo also is inapposite. The Court ultimately held that even if an ordinance is later held unconstitutional, an officer can reasonably rely on it to affect an arrest, 443 U.S. at 40. The Court stated in passing that, "whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." *Id.* State law "is relevant to the validity of the arrest and search only as it pertains to the 'facts and circumstances' we hold constituted probable cause for arrest." *Id.* In other words, probable cause is the constitutional standard, but state law defines the crime for which the officer must have probable cause. *See Ryan v. County of DuPage*, 45 F.3d 1090, 1093 (7th Cir. 1995). Moreover, the statement in *DeFillippo* is again dicta, because the defendant did "not contend that the arrest was not authorized by Michigan law." *DeFillippo*, 443 U.S. at 36.

In the years since this Court in *Mapp* applied the Constitution's exclusionary rule to the States, this Court has "*never* taken the position that an arrest made on probable cause violates the Fourth Amendment merely because a taking of custody was deemed unnecessary (as a matter of state law or otherwise)." 1 Wayne R. LaFave, *Search and Seizure,* at § 1.5(b) (emphasis in original). Because the arrest conformed to the Constitution, the officer could search incident to that arrest.

C. Relying on This Court's Jurisprudence, the Lower Courts Overwhelmingly Have Rejected the Rationale of the Supreme Court of Virginia.

Most of the United States Courts of Appeals have rejected the argument that officers who arrest based on probable cause, but violate a state statute governing the arrest, act in violation of the United States Constitution.[26] This consensus provides

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[26] *See United States v. Van Metre*, 150 F.3d 339, 346-47 (4th Cir. 1998) (confessions were admissible even though the arrest violated Tennessee law, which required police to obtain a fugitive of justice warrant; at the time of the arrest the officers had three valid warrants); *United States v. Bell*, 54 F.3d 502, 504 (8th Cir. 1995) (arrest for operating a bicycle without a headlight violated Iowa law but not the United States Constitution because it was based on probable cause); *Wright*, 16 F.3d at 1437 (stricter requirements of Tennessee law for warrantless arrests irrelevant where officers had probable cause; therefore, suppression of drug evidence seized from defendant's rental car not required); *Walker*, 960 F.2d at 415-17 (methamphetamine need not be suppressed if officers had probable cause to arrest; whether arrest violates Texas law irrelevant for purposes of constitutional analysis). Some courts, before *Atwater*, have ruled otherwise. *See United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir. 1993); *contra Barry v. Fowler*, 902 F.2d 770, 772 (9th Cir. 1990) (concluding that the violation of a California statute in making the arrest was irrelevant to Fourth Amendment analysis, which turned on the existence of probable cause); *United States v. Trigg*, 878 F.2d 1037, 1041 (10th Cir. 1989) (reasonableness of arrest for misdemeanor depends on probable cause and strictures of state law and customary practices); *contra United States v. Miller*, 452 F.2d 731, 733 (10th Cir. 1971) (under state law, officers should not have arrested defendant for a misdemeanor that did not occur in the officers' presence;

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persuasive authority for reversing the decision below. Similarly, when confronted with a 42 U.S.C. § 1983 action alleging that the Fourth Amendment was violated because an arrest was impermissible under state law, a strong consensus has emerged among federal appellate courts rejecting the argument that an arrest that was improper under state law and rendered the arrest unconstitutional under the Fourth Amendment.[27] Finally, state courts that have considered the issue have rejected a "probable cause plus" standard that would incorporate state law.[28]

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however, since arrest was founded upon probable cause, suppression of sawed-off shotgun was not required).

[27] *See Knight v. Jacobson*, 300 F.3d 1272, 1276 (11th Cir. 2002) (arrest for misdemeanor assault that did not occur in officer's presence violated state law but not federal law; § 1983 lawsuit was dismissed because "[t]here is no federal right not to be arrested in violation of state law."); *Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3, 6 (1st Cir. 1997) (section 1983 relief unwarranted because officers acted with probable cause; Puerto Rico rule of court prohibiting arrest for misdemeanors that do not occur in the officer's presence did not affect constitutional standard); *Gordon v. Degelmann*, 29 F.3d 295, 301 (7th Cir. 1994) (fact that defendant was entitled to a hearing under Illinois law to challenge his removal as a trespasser was irrelevant; officers did not face § 1983 liability when their arrest was made with probable cause); *Anderson v. Haas*, 341 F.2d 497, 498-99 (3rd Cir. 1965) (in civil rights action, district court erroneously concluded that validity of officer's arrest hinged on state law). *But see Malone v. County of Suffolk*, 968 F.2d 1480 (2nd Cir. 1992) (citing *Di Re* among other authorities for the proposition that the constitutionality of an arrest can be assessed according to state law in a § 1983 action).

[28] *See New Hampshire v. Smith*, 908 A.2d 786, 790 (N.H. 2006) (arrest was not unconstitutional even though it was made outside of jurisdictional boundary as defined by state law); *McKay*, 41 P.3d

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This Court should reaffirm the constitutional validity of an arrest that is founded on probable cause, whether or not the arrest infringes on some provision of state law. "The test is one of federal law, neither enlarged by what one state court [or legislature] may have countenanced, nor diminished by what another may have colorably suppressed." *Elkins*, 364 U.S. at 224.

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at 65-72 (defendant's arrest for riding a bicycle in the wrong direction on a residential street violated state law, but because arrest was based on probable cause it did not violate the United States Constitution); *Michigan v. Hamilton*, 638 N.W.2d 92, 97-98 (Mich. 2002) (evidence seized by police outside the territorial limit of their authority violated state law but did not violate the Constitution); *Ohio v. Droste*, 697 N.E.2d 620, 623 (Ohio 1998) (liquor control officers lacked statutory authority to arrest in this specific situation but suppression was unwarranted because officers had probable cause to arrest); *Maine v. Jolin*, 639 A.2d 1062, 1064 (Me. 1994) (rejecting argument that arrest beyond territorial jurisdiction as defined by state law violated the United States Constitution); *Massachusetts v. Lyons*, 492 N.E.2d 1142, 1144-46 (Mass. 1986) (defendant's arrest was improper under state law because he was not provided notice to challenge misdemeanor complaint; however, suppression of witness's identification must be denied because the arrest was made with probable cause); *Colorado v. Hamilton*, 666 P.2d 152, 157 (Colo. 1983) (arrest made beyond officer's territorial jurisdiction did not violate the United States Constitution even if it violated state law); *North Carolina v. Eubanks*, 196 S.E.2d 706, 709 (N.C. 1973) (offense of driving under the influence did not occur in officer's presence and, therefore, violated state law; nevertheless, suppression was not warranted because the officer acted with probable cause and thereby satisfied the National Constitution).

IV. THE DECISION BELOW IS IMPRACTICAL AND UNNECESSARY FROM A POLICY STANDPOINT.

A. Grafting State Law Strictures Onto the Simple Probable Cause Standard Would Inject Needless Complexity Into the Law.

At present, the probable cause standard, unfettered by further state law requirements, has the virtue of simplicity, clarity and uniformity. *See Texas v. Brown*, 460 U.S. 730, 742 (1983) (noting that "probable cause is a flexible, common-sense standard.").[29] In contrast to the simple, well-established rule of probable cause, constitutionalizing the myriad state rules governing arrests would inject considerable complexity and uncertainty into the constitutional law of arrest. Some States, like Virginia, have restricted an officer's arrest authority with respect to misdemeanor offenses.[30] An officer's authority might be limited to a particular category of offense. For example, a game warden might be limited to making arrests for

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[29] *See also Brinegar*, 338 U.S. at 176 ("The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating . . . opposing interests. Requiring more would unduly hamper law enforcement.").

[30] *See Iowa Code* § 805.16 (mandating release on a summons for certain offenses); *Kentucky Rev. Stat.* § 431.015 (same); *Nebraska Rev. Stat.* § 29-435 (same); *New Mexico Stat.* § 66-8-123 (same); *Ohio Rev. Code* § 2935.26 (same).

hunting offenses.[31] An officer tasked with enforcing the laws relating to alcohol may have arrest authority limited to that particular sphere.[32] A police officer's authority might be limited to a particular geographic area.[33] Other restrictions on the authority to arrest might stem from regulations, local policies and practices, or orders from within the police hierarchy. These regulations might restrict, for example, the authority of police officers who work off-duty in shopping malls or night clubs.[34]

If this Court adopted a "probable cause plus state law" standard, a host of questions would arise. Would all state criminal procedure statutes governing arrests be incorporated into the expanded Constitutional standard, or only certain statutes? If so, which ones? For example, would statutes limiting arrests to a particular jurisdiction require suppression of evidence seized incident to an arrest that occurs outside that territory? A number of statutes require officers making

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[31] *See Garcia*, 676 F.2d at 1093-94 (discussing limited arrest authority of Texas game wardens), *rev'd by Garcia*, 462 U.S. at 1127.

[32] *See Droste*, 697 N.E.2d at 623 (discussing restricted arrest authority of liquor control investigators).

[33] *See, e.g.*, *Smith*, 908 A.2d at 790; *Hamilton*, 638 N.W.2d at 97-98; *Jolin*, 639 A.2d at 1064; *Hamilton*, 666 P.2d at 157.

[34] *See Virginia Code* § 15.2-1712 (authorizing municipal governments to enact ordinances permitting local police to work off-duty, including to exercise their arrest powers, and further permitting municipalities to allow police departments to promulgate "reasonable rules" governing off-duty employment).

an arrest to wear a uniform and/or to display a badge of authority.[35] Would a failure to display the badge or to wear a uniform require suppression? Would federal officers be bound by these state statutes and regulations, particularly when the federal officers are cross-designated with state arrest authority?[36] Would federal courts be required to consult these state statutes when state law enforcement officers testify in federal court? Which law would control when the prosecution occurs in one state but evidence was obtained in violation of the law of a sister state? Would any defenses be applicable, and, if so, which ones? Would a violation of regulations and policies adopted by local governments or police departments provide grounds to challenge an arrest as

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[35] *See Montana Code Ann.* § 61-8-703 (2007) (authorizing arrest for speeding if the officer is in uniform or displays his badge of authority); *Nebraska Rev. Stat.* § 60-6, 192 (2007) (permitting arrests for speeding if the officer, *inter alia*, "[i]s in uniform and displays his or her badge of authority"); *North Dakota Cent. Code* § 39-03-15 (2007) (authorizing warrantless arrests when speeding is determined by radar, provided the officer "is in uniform or displays the officer's badge of authority"); *Virginia Code* § 46.2-102 (generally requiring officers in traffic cases to be uniformed or to display a badge of authority).

[36] Cross-designation of state and federal officers is a common practice. *See, e.g.,* Federal Bureau of Investigation, St. Louis Metro. Fugitive Task Force, http://stlouis.fbi.gov/coordination.htm (last visited Oct. 30, 2007) (noting that, in an effort to combat violent crime, "[e]ach federal officer has been cross-designated as a peace officer in the state of Missouri.").

unconstitutional, or would the constitutionality of an arrest be limited to state statutes?

Jurisprudential questions aside, a host of practical difficulties would arise. Under state misdemeanor-summons statutes, it will often be unclear whether the crime at issue is a misdemeanor or a felony. For example, under Virginia law, theft of an item worth more than $200 is a felony, *Virginia Code* § 18.2-95, for which an officer may effect a full custodial arrest. On the other hand, theft of an item valued at less than $200 is petit larceny, a Class 1 misdemeanor, *Virginia Code* § 18.2-96, for which a summons is generally required. *Virginia Code* § 19.2-74. The value of an item often is not immediately apparent to the arresting officer. Or an officer may in good faith make an erroneous judgment about the propriety of an arrest under one of the exceptions to the misdemeanor summons statute. Other States no doubt have similar exceptions that will dramatically increase the complexity of arrests as well suppression hearings.

Statutes linking the power to arrest to jurisdictional boundaries within a State can have their own complexities. For example, *Virginia Code* § 19.2-250 provides that an officer's jurisdiction extends to one mile beyond his jurisdictional boundary,

> except that such jurisdiction of the corporate authorities of towns situated in counties having a density of population in excess

> of 300 inhabitants per square mile, or in counties adjacent to cities having a population of 170,000 or more, shall extend for 300 yards beyond the corporate limits of such town or, in the case of the criminal jurisdiction of an adjacent county, for 300 yards within such town.

For investigations that cross state lines, officers would have to determine which State's law of arrest should govern.

This Court has "traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Atwater*, 532 U.S. at 347. "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway*, 442 U.S. at 213-14. Re-affirming the probable cause standard would ensure continuing uniformity and simplicity in all state and federal courts. In contrast, importing state law, regulations and policies into the constitutional analysis of an arrest will prove very difficult to administer not only for courts but also for officers who must make difficult decisions "on the spur (and in the heat) of the moment." *Atwater*, 532 U.S. at 347. The Court should decline to cast aside

the time-tested probable cause standard in favor of some unproven and far more complex standard.

B. Constitutionalizing State Laws Governing Arrests Is not Necessary to Protect the Citizenry and May Well Prove Counterproductive.

Refusing to graft state law strictures onto the probable cause standard will not leave the citizenry at the mercy of overzealous law enforcement. First, any arrest must be based upon probable cause. This standard provides a safeguard against arbitrary action by the police. "The long-prevailing standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime.'" *Pringle*, 540 U.S. at 370.[37] Suppression motions are granted on a routine basis when law enforcement act without probable cause in the case of an arrest, or without reasonable suspicion while making a *Terry*[38] stop. In addition, state officers are also held accountable through whatever remedies the States have seen fit to impose for violations of their particular statutes.

Second, with respect to misdemeanor-summons statutes, the Nation is not "confronting anything like an epidemic of unnecessary minor-offense arrests" owing, in part, to the "good sense" of law enforcement

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[37] *See also Brinegar*, 338 U.S. at 176.

[38] *Terry v. Ohio*, 392 U.S. 1 (1968).

who have neither the desire nor the resources to make full custodial arrests in every possible instance. *Atwater*, 532 U.S. at 353. Indeed, "it is in the interest of police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason." *Id.* at 352. Therefore, any argument that the "probable cause plus" standard is necessary to protect the people is without merit.

That the probable cause standard is adequate to protect the citizenry can be seen in the disposition of the issue in the case at bar by the lower courts. As noted above, state and federal courts that have addressed the issue have overwhelmingly concluded that an arrest that is based on the probable cause is constitutional, regardless of any strictures of state law. This conclusion has not placed citizens in those jurisdictions at the mercy of rampant exactions at the hands of their state governments.

In the long term, it is far from obvious that constitutionalizing state criminal procedure statutes on the subject of arrest would amount to a triumph for civil liberties. At present, the States are free to impose strictures on their officers' powers of arrest and can determine how to punish an officer who violates those strictures. Constitutionalizing those laws would mandate the suppression remedy. State legislatures will be more reluctant to enact such laws if the cost is the suppression of relevant evidence and the release of dangerous criminals. The net result of extending the applicability of the exclusionary rule is

likely to be an erosion of state law protections rather than a strengthening of those protections.

This Court's experience with constitutional standards in the context of procedural due process challenges to prison regulations is instructive. In *Hewitt v. Helms*, 459 U.S. 460 (1983), the Court adopted a methodology for assessing the creation of liberty interests that examined whether "mandatory language and substantive predicates created an enforceable expectation that the State would produce a particular outcome with respect to the prisoner's conditions of confinement." *Sandin v. Conner*, 515 U.S. 472, 481 (1995). After experiencing growing frustration with this methodology, this Court found that detailed oversight of these regulations "creates disincentives for States to codify prison management procedures in the interest of uniform treatment." *Id.* at 482.

> Prison administrators need be concerned with the safety of the staff and inmate population. Ensuring that welfare often leads prison administrators to curb the discretion of staff on the front line who daily encounter prisoners hostile to the authoritarian structure of the prison environment. Such guidelines are not set forth solely to benefit the prisoner. They also aspire to instruct subordinate employees how to exercise discretion vested by the State in the warden, and to confine the authority of prison personnel in order to avoid widely different treatment of similar incidents. The approach embraced by *Hewitt* discourages

> this desirable development: States may avoid creation of "liberty" interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel."

Id. In similar fashion, if the state statutes, regulations and policies that govern the arrest authority of state officers triggered the application of the exclusionary rule, it would create perverse incentives for the States to avoid such restrictions. States will instead either avoid such laws altogether or they will confer on their officers a standardless discretion that is neither desirable from the viewpoint of the State nor of the citizens who encounter law enforcement.

CONCLUSION

For the reasons stated above, and in the amici briefs supporting Virginia, the judgment of the Supreme Court of Virginia should be **REVERSED**.

Respectfully submitted,

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